No. 90-49

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LELAND L. LOCKARD and
LYNETTE LOCKARD,
Plaintiffs-Petitioners,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation, and
ROSELLA RAY d/b/a
ROSELLA RAY'S BOARDING HOUSE,
Defendants-Respondents.

On Petition for Writ of Certiorari from
the United States Court of Appeals for the Eighth Circuit
No. 89-1068

PETITION FOR WRIT OF CERTIORARI

JEANNE L. SATHRE
Counsel of Record
DAVID R. HERNDON
LAKIN & HERNDON
251 Old St. Louis Road
P.O. Box 27
Wood River, IL 62095
(618) 254-1127
Attorneys for
Plaintiffs-Petitioners

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether *Finley v. United States*, 109 S.Ct. 2003 (1989) abrogated all pendent party jurisdiction under the FELA.

2. Whether *Finley v. United States*, requires an affirmative grant of pendent party jurisdiction by Congress.

3. Whether *Finley v. United States* should be applied to vacate a judgment entered against a pendent party in an FELA action where the party never raised any jurisdictional objection and the judgment was entered prior to the *Finley* decision.

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OPINIONS BELOW

The opinion delivered in the Eighth Circuit Court of Appeals is published at 894 F.2d 299. The opinion delivered in the United States District Court for the District of Nebraska is unpublished.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was signed and entered on January 19, 1990. A Petition for Rehearing and Suggestions for Rehearing En Banc were filed by

plaintiffs and a Petition for Rehearing was filed by the defendant, Missouri Pacific Railroad Corporation. These Petitions were denied on April 4, 1990. This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. Section 1254.

STATUTES INVOLVED

45 U.S.C.Section 51

Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in while or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. Section 56

Section 56, Actions; limitations; concurrent jurisdiction of courts

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

28 U.S.C. Section 1445(a)

Section 1445. Nonremovable Actions.

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

STATEMENT OF THE CASE

This action arises under the Federal Employees Liability Act and involves a personal injury to the plaintiff that occurred during his employment but on the premises of a rooming facility owned by someone other than the his employer.

The plaintiff sought recovery for his injuries by filing an FELA action in federal court against his employer, Missouri Pacific Railroad Company (MoPac). Federal jurisdiction in the district court was based on 45 U.S.C. Section 56. Because the plaintiff was injured on premises owned by someone other than his employer, he joined a state law negligence claim against the owner, Rosella Ray, d/b/a Rosella Ray's Boarding House (Ray). A claim for loss of consortium on behalf of the plaintiff's wife was also filed against Ray. Although there was no

independent jurisdictional basis for the state law claims, they arose from identical facts as the FELA claim, and were tried, without objection, as pendent party claims.

The case was tried before a jury which returned verdicts in favor of the plaintiffs and against the defendants, with individual damage awards assessed against each defendant. The court entered judgment on the jury verdicts and the defendants separately appealed. Although numerous issues were raised on appeal, neither defendant raised any issue of federal jurisdiction.

At oral argument on the appeal, in light of this court's then recent opinion in *Finley v. United States*, 109 S.Ct. 2003 (1989), the court of appeals, sua sponte, first raised the issue of federal jurisdiction over the claims against the state law defendant Ray. After additional briefing of this issue, the court rendered a divided opinion wherein it held that, under *Finley*, pendent party jurisdiction exists only where Congress has affirmatively granted such jurisdiction, and that there is no such affirmative grant in the jurisdictional provisions of the FELA. Accordingly, even though *Finley* was decided after the judgments were entered in this case, the court vacated the judgments entered against Ray on the basis of lack of federal jurisdiction. The judgment against MoPac was affirmed.

Plaintiff's Petition for Rehearing En Banc was denied by the court, although the Honorable Judges Fagg, Bowman and Beam would have granted the petition.

ARGUMENT

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IMPROPERLY APPLIED *FINLEY V. UNITED STATES* TO REQUIRE AN AFFIRMATIVE GRANT OF PENDENT PARTY JURISDICTION FROM CONGRESS AND TO BAR PENDENT PARTY JURISDICTION IN FELA CLAIMS.

The Eighth Circuit Court of Appeals, relying on this court's recent decision in *Finley v. United States*, 109 S.Ct. 2003 (1989), held that pendent party jurisdiction does not exist under the FELA, and that a state law claim against a third party can never be joined with an FELA claim in federal court, absent diversity. In so ruling, the Court vacated judgments against a state law defendant and dismissed the claims against that defendant for lack of federal jurisdicition under *Finley*. It did so even though no jurisdictional objection had ever been raised by the defendant, and even though the judgments against the defendant were entered prior to the decision in *Finley*.

In reaching this decision, the Court of Appeals construed *Finley* as requiring an actual affirmative grant of pendent jurisdiction by Congress before pendent party jurisdiction can be recognized. Applying this requirement to the FELA, the court held that there can be no pendent party jurisdiction in FELA claims since the FELA says nothing about claims against anyone other than railroads.

The plaintiff submits that the Eighth Circuit erred in construing *Finley*, and that it gave *Finley* a sweeping application which was unintended by this court and which is in direct conflict with congressional enactments governing FELA claims. Specifically, the plaintiff submits that the court erred in holding that *Finley* requires an affirmative grant of pendent party jurisdiction by Congress; that the court erred in finding that the FELA enanctments do not evidence a congressional intent to allow pendent party jurisdiction under *Finley*; and that the court erred in applying *Finley* to vacate a judgment entered prior to *Finley*. The plaintiff further submits that the court applied the *Finley* holding in a manner which spells the death knell of pendent party jurisdiction.

It has done so at great prejudice to both plaintiffs and defendants in FELA actions, and at the cost of specific rights granted to FELA plaintiffs by Congress.

The statutes dealing with jurisdiction of FELA claims clearly establish that congress intended to give an FELA plaintiff a liberal remedy, including a liberal choice of where his action would be heard. By statutory enactment, Congress gave the injured employee a wide choice of forums, including an uninhibited and equal election between filing his case in either a state or federal court. 45 U.S.C. Section 56. Moreover, to ensure this unfettered choice of a federal or state forum by the FELA plaintiff, Congress enancted an additional staute which prohibits removal of FELA actions if the plaintiff elects to file his claim in a state court. 28 U.S.C. Section 1445(a). The combined effect and intent of these statutes is to ensure to the FELA plaintiff a broad and unhindered right to choose where his case will be tried, including the equal right to choose between federal or state courts.

The ruling of the Eighth Circuit, however, severly encroaches upon this right of the FELA plaintiff, as the choice of forums is no longer equal and can no longer be made upon a balance of factors personal to the plaintiff, as was intended by Congress. Rather, in cases where there exists a state law claim arising out of the same facts, but without diversity of parties, the plaintiff must now deal with the overriding factor that only in the state court can his entire claim be tried together. The federal and state courts are no longer equally available, as intended by Congress, since the plaintiff can pursue only a portion of his claim in the federal court.

The above statutes should have been held to evidence a congressional intent in favor of allowing pendent party jurisdiction in FELA claims. The Eighth Circuit, however, erroneously construed the availability of an alternate state court forum as a factor supporting the denial of pendent party jurisdiction rather than as an expression of congressional intent supporting pendent party jurisdiction. As stated by the court at page 7 of its opinion, "If FELA plaintiffs wish to sue both the railroad and pendent parties in a single forum, they may do so

in state court." In so stating the court has missed the point. The point is not that the plaintiff can file in state court. The point is that the plaintiff is now resigned to filing in the state court if he wishes to sue all responsible parties. The point is that the uninhibited choice of forums that Congress zealously sought to provide the FELA plaintiff is no longer available.

The Eighth Circuit, in applying *Finley* to bar pendent party jurisdiction in FELA actions, improperly applied the *Finley* result to a factual situation foreign to that presented to the court in *Finley*. Rather than subjecting the case to the proper *Aldinger* analysis that requires that the court satisfy itself that Congress has not expressly or by implication negated the existence of pendent party jurisdiction, the court applied a rule which requires an actual affirmative grant of pendent party jurisdiction by Congress. The *Finley* court, despite some sweeping language, did not deviate from the *Aldinger* analysis to this extent.

As was aptly stated by the Honorable Judge Beam, in his dissent below:

> The majority opinion states that "pendent party jurisdiction exists only where Congress has affirmatively granted such jurisdiction" and cites *Finley*, 109 S.Ct. at 2009. There is nothing on page 2009 that supports this conclusion. Rather, the Supreme Court explains thepetitioner's argument that the rewording of the FTCA has created an affirmative grant of pendent party jurisdiction. The Supreme Court disagreed with this interpretation of the FTCA but did not decide *Finley* on that basis. Thus, even considering Justice Blackmaun's analysis of the majority opinion as expressed in his dissent, id. at 2010, I believe that the majority opinion misinterprets *Finley*.

Indeed, not only did the court in *Finley* specifically state that it was not reversing existing law, but a review of the entirety of the *Finley* opinion reveals that the case turns, not upon any change in the *Aldinger* analysis, but upon the specific text of the limited jurisdictional grant under the FTCA.

The FELA, however, in contrast to the FTCA, does not have the type of jurisdictional limitation or restriction which was the basis of the *Finley* holding. Rather than restricting where an FELA plaintiff may file his suit, Congress has enacted special legislation insuring that the concurrent jurisdiction available to FELA plaintiffs is not infringed upon.

It is this broad jurisdictional grant that courts, prior to *Finley*, relied upon in holding that pendent party jurisdiction was available in FELA actions. See, e.g., *Shogren v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 630 F.Supp. 233 (D. Minn. 1986); *DeMaio v. Consolidated Rail Corp.*, 489 F.Supp. 315 (S.D. N.Y. 1980); *Potter v. Rain Brook Feed Co.*, 530 F.Supp. 569 (E.D. Cal. 1982); *Madarash v. Long Island Railroad Co.*, 654 F.Supp. 51 (E.D. N.Y. 1987).

The reasoning of these cases, approving pendent party jurisdiction in FELA cases, is sound and fully consistent with the analysis done in *Aldinger* and adopted in *Finley*. Unfortunately, the Eighth Circuit, because of some of the broad language in *Finley*, has ascribed a holding to *Finley*, requiring a positive affirmative grant of pendent jurisdiction, which is unfounded and contrary to the actual analysis that was undertaken by the court.

The *Finley* holding, as it was construed by the Eighth Circuit, and as it is being construed by other federal courts, marks a profound change in the law regarding pendent party jurisdiction. The Eighth Circuit has taken *Finley* beyond its four corners and has applied it in such a way as to reverse *Aldinger* and to do away with pendent party jurisdiction altogther. The plaintiff submits that the Eighth Circuit has misconstrued and misapplied the *Finley* decision, and has given that case a broad and sweeping application which is unwarranted by the facts of the case and which is in conflict with the very analysis used by this court in rendering its decision in *Finley*. The plaintiff further submits that the failure to announce a change in the law regarding pendent party jurisdiction necessitates that *Finley* be held to its four corners and not applied in such a way as to render prior law regarding pendent party jursidiction a nullity, as was done by the Eighth Circuit in this case.

CONCLUSION

For the foregoing reasons, it is submitted that this case presents issues of sufficient importance to require a resolution by this Court of the scope of *Finley v. United States* and its application to suits brought pursuant to the F.E.L.A. It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Jeanne L. Sathre
David R. Herndon
LAKIN & HERNDON
251 Old St. Louis Road
P.O. Box 27
Wood River, Il. 62095
(618) 254-1127

Attorneys for Plaintiffs-Petitioners

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1068

Leland L. Lockard,

Appellee,

Lynette Lockard,

v.

Missouri Pacific Railroad Company, a corporation,

Appellant

Rosella Ray d/b/a/ Rosella Ray's Boarding House

No. 89-1069

Leland L. Lockard;
Lynette Lockard,

Appellees,

v.

Missouri Pacific Railroad Company, a corporation,

Rosella Ray d/b/a Rosella Ray's Boarding House,

Appellant.

Appeals from the United States District Court
for the District of Nebraska.

Submitted: September 25, 1989

Filed: January 19, 1990

Before LAY, Chief Judge, ARNOLD and BEAM, Circuit Judges.

LAY, Chief Judge.

Leland Lockard sued Missouri Pacific Railroad Company (MoPac) pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C.

§§ 51-60 (1982), and the jury awarded $600,000 reduced by a finding of twenty percent contributory negligence. Leland Lockard also sued Rosella Ray, d/b/a Rosella Ray's Boarding House, for negligence under Nebraska law, and the jury awarded $200,000 reduced by a finding of twenty-five percent contributory negligence. Lynette Lockard sued Ray for loss of consortium under Nebraska law, and the jury awarded $50,000. Both defendants appeal. We vacate the judgments against Ray for lack of federal jurisdiction, and affirm the judgment against MoPac.

I. BACKGROUND

In November of 1984, MoPac and Ray entered into a written agreement for the lodging of MoPac's crew members. Ray agreed to "furnish, maintain and operate motel lodging facilities" for a one-year period and to "provide 24-hour per day motel management." MoPac agreed to pay Ray on a monthly basis.

Leland Lockard was assigned as a fireman to the crew of a local MoPac train. On December 14, 1984, Lockard reported to work in Auburn, Nebraska, from which the train was to depart for Crete, Nebraska. The train was regularly scheduled to depart from Auburn on Mondays, Wednesdays, and Fridays, with a layover in Crete on those evenings and return to Auburn on the following mornings. Lockard and the crew arrived in Crete at approximately 10:00 p.m. on December 14, and checked into Rosella Ray's Boarding House

When Lockard and the crew arrived in Crete, approximately four to five inches of new snow covered the ground. Lockard testified that the sidewalk and the steps leading up to the sole entrance of the boarding house had been partially cleared.

Lockard used the steps when he left for dinner that evening, and again when he returned. At 6:30 a.m. on December 15, 1984, Lockard used the steps when he left the boarding house for breakfast. It had rained during the night and, as the temperature was below freezing, there was a glaze of ice on the steps. Lockard held on to the railing as he departed. It was drizzling when Lockard returned to his room after

breakfast. At 7:15 a.m., when Lockard left the boarding house to report for work, he slipped on the icy top step and fell down the steps on his back and hip.

The plaintiffs recovered money damages against the defendants as set forth. The trial court overruled defendants' motions for a new trial as well as their motions for judgments n.o.v.

II. DISCUSSION

A. Pendent Party Jurisdiction[1]

Lockard's FELA claim alleged negligence arising from MoPac's failure to: (1) provide Lockard with a reasonably safe place to work and/or lodge; (2) maintain the boarding house steps in a safe condition when it would have known the steps were icy; (3) inspect the steps; and (4) remove the ice from the steps. The complaint also joined the state claims against Ray. No independent basis of federal jurisdiction existed over Ray.[2]

The question whether federal jurisdiction is properly asserted over Ray must be evaluated in light of *Finley v. United States*, 109 S. Ct. 2003 (1989).[3] In *Finley*, the Supreme Court held that the Federal Tort Claims Act (FTCA) authorizes suit only against the United States and not against other parties as to whom no independent basis of federal jurisdiction exists — so-called "pendent parties." *Id.* at 2010. The

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[1]The issue of federal jurisdiction over Rosella Ray was not raised by the parties below nor addressed by the district court. The issue was raised for the first time by this court at oral argument, and was subsequently briefed by the parties.

[2]No diversity of citizenship under 28 U.S.C. § 1332 (1982) was asserted by the plaintiffs.

[3]In *Finley*, A widow brought an action in federal court against the United States after her husband and two children were killed in an airplane accident. She sued under the FTCA, alleging that the Federal Aviation Administration had negligently maintained runway lights at the airfield where the crash occurred. The complaint was later amened to include state claims against nonfederal defendants.

Court examined the text of the FTCA which provides that "the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States," 28 U.S.C. § 1346(b) (1982), and held that "'against the United States' means against the United States *and no one else*." *Finley*, 109 S. Ct. at 2008 (emphasis added). Applying this interpretive rule, we must similarly conclude that the FELA authorizes jurisdiction over railroads *and no one else*.

Prior to *Finley*, the issue of whether the FELA permitted pendent party jurisdiction was far from settled. The uncertainty stemmed from the Court's holding in *Aldinger v. Howard*, 427 U.S. 1 (1976), that a federal court may exercise pendent party jurisdiction only after determining "that Congress in the statutes conferring jurisdiction has not expressly or by implication *negated* its existence." *Id.* at 18 (emphasis added).[4] This standard persuaded some courts to read *Aldinger* narrowly, concluding that pendent party jurisdiction was permitted under the FELA because it had not been implicitly or explicitly prohibited by Congress.[5] Other courts, however, reached a contrary conclusion.[6]

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[4]In *Aldinger*, the plaintiff sued individual defendants under 42 U.S.C. § 1983, and sought to append to the suit state-law claims against a country. At that time, under *Monroe v. Pape*, 365 U.S. 167 (1961), counties were exempt from § 1983 Liability. The Court held that the jurisdictional statute under which the suit was brought, 28 U.S.C. § 1343, did not mean to confer jurisdictrion over parties that had been specifically *excluded* from § 1983 liability. *Aldinger*, 427 U.S. at 17.

[5]*See Madrash v. Long Island R.R.*, 654 F. Supp. 51, 54 (E.D.N.Y. 1987); *Shogren v. Chicago, Milwaukee, St. P. & Pac. R.R.*, 630 F. Supp. 233, 234 (D. Minn. 1986); *Patter v. Rain Brook Feed Co.*, 530 F. Supp. 569, 579 (E.D. Cal. 1982); *DeMaio v. Consolidated Rail Corp.*, 489 F. Supp. 315, 316 (S.D.N.Y.1981).

[6]*See Young v. Consolidated Rail Corp.*, 710 F. Supp. 192, 194 (E.D. Mich. 1989) ; *Stinefelt v. Baltimore & Ohio R.R.*, 664 F. Supp. 989, 990 (D. Md. 1987); *Scheck v. National R.R. Passenger Corp.*, 1985 WL 3172 (E. D. Pa. 1985); *Shields v. Consolidated Rail Corp.*, 530 F. Supp. 400, 401-02 (S. D. N. Y. 1981).

In our view, *Finley* resolves the issue with a clear rule of statutory interpretation. Under *Finley*, pendent party jurisdiction does not exist merely by the fact Congress has failed to negate it. Rather, pendent party jurisdiction exists only where Congress has *affirmatively granted* such jurisdiction. *Finley*, 109 S. Ct. at 2009.[7] The Court in *Finley* concluded its holding by stating: "All our cases—*Zahn*, *Aldinger*, and *Kroger*—have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties. Our decision today reaffirms that interpretative rule; the opposite would sow confusion." *Id.* at 2010. This rule applies even where the claims against the additional parties "'derive from a common nucleus of operative fact,' and are such that a plaintiff" would ordinarily be expected to try them [all] in one judicial proceeding.'" Id. at 2006 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). As the court in *Finley* stated: "[W]ith respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly." 109 S. Ct. at 2007.

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[7]The petitioner in *Finely* attempted to find an "affirmative grant" of jurisdiction by reason of the change made in the comprehensive 1948 revision of the Judicial Code. The Court specifically rejected this argument. The Court stated: "The statute here defines jurisdiction in a manner that does not reach defendants other than the United States." 109 S. Ct. at 2009.

Justice Blackmun in dissent reconized the holding of the majority to turn on the issue of whether an affirmative grant of jurisdiction appears in the statute. However, he disagreed that this should be the issue. He stated:

> If *Aldinger v. Howard* * * * required us to ask wether the Federal Tort Claims Act embraced "an affirmative grant of pendent-party jurisdiction," * * * I would agree with the majority that no such specific grant of jurisidiction is present. But, in my view, that is not the appropriatre question under *Aldinger*. I read the Court's opinion in that case, rather, as requiring intent to *exempt* "the party as to whom jurisidiction pendent to the principal claim" is asserted from being haled into federal court.

Finley, 109 S. Ct. at 2010 (Blackmun, J., dissenting).

Plaintiffs argue that Finley does not control this case because the jurisdictional grant under the FELA is broader than the jurisdictional grant under the FTCA. We see no *relevant* difference in the two provisions, however. As we have noted, the FTCA confers jurisdiction over "civil actions on claims against the United States." 28 U.S.C. § 1346(b). By comparison, the FELA provides that "[e]very common carrier by railroad * * * shall be liable * * *," 45 U.S.C. § 51, and, further, that "*[u]nder this chapter* an action may be brought in a district court of the United States, * * *." 45 U.S.C. § 56 (emphasis added). It is clear from this language that the FELA accomplishes in two steps what the FTCA accomplishes in one: a grant over claims involving particular parties, in this case FELA claims against railroads.[8] Therefore, *Finley's* holding that such a jurisdiction grant "does not itself confer jurisdiction over additional claims by or against different parties," 109 S. Ct. at 2006, is equally applicable under the FELA.

Our decision that pendent party jurisdiction is not authorized by the FELA is less harsh than the *Finley* holding in one important respect. The FTCA does not permit suit against the government in state court. *See* 28 U.S.C. § 1346(b). Although this factor was noted in *Finley*, the Court nonetheless found the statutory language controlling. The Court stated:

> Because the FTCA permits the Government to be sued only in federal court, our holding that parties to related claims cannot necessarily be sued there means that the efficiency and convenience of a consolidated action will sometimes have to be

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[8]Plaintiffs argue that Ray's status as a statutory agent of the railroad makes a difference. We fail to see how. Although the FELA does make railroads liable for the negligence of their officers, agents, and employees, *see* 45 U.S.C. § 51, the statute nevertheless imposes liability only on railroads — not on *railroads and their agents*. Plaintiffs concede as much by basing their claims against Ray solely on Nebraska law. By the same token, the FTCA makes the federal government liable for the acts of *its* agents. *See* 28 U.S.C. §§ 1346 (b), 2674 (1982). Yet, the Court did not even mention this as a factor in *Finley*.

> forgone in favor of separate actions in state and federal courts. We acknowledged this potential consideration in *Aldinger*, 427 U.S., at 18, 96 S.Ct., at 2422, but now conclude that the present statute permits no other result.

109 S. Ct. at 2010.

By contrast, FELA suits may be brought in state court as well as federal court. 45 U.S.C. § 56. Removal to federal court by the railroad is prohibited. 28 U.S.C. § 1445(a) (1982). Therefore, FELA plaintiffs do not necessarily face the dilemma of bifurcated lawsuits as do their FTCA counterparts. If FELA plaintiffs wish to sue both the railroad and pendent parties in a single forum, they may do so in state court.[9]

In construing acts of Congress, we must be mindful that "[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley* 109 S. Ct. at 2010. Applying the clear interpretive rule set out by the Supreme Court in *Finley*, we hold that federal jurisdiction does not exist over Rosella Ray in this case. We therefore vacate the judgments against her and order that the claims against her be dismissed.

B. FELA Claim

MoPac argues that there is insufficient evidence of its own negligence. MoPac asserts that Lockard's injuries were caused by unforeseeable weather conditions occurring on property owned and maintained by Ray. Thus, MoPac argues, to sustain liability here would make it an absolute insurer of its employees whether an employee was on or off railroad property, and whenever there was a dangerous change in the weather.

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[9]Even prior to *Finley*, this was an important factor in some court decisions holding pendent party jurisdiction inapplicable to the FELA. *See young*, 710 F. Supp. at 194; *Stinfelt*, 664 F. Supp. at 990; *Scheck*, 1985 WL 3172 at 4-5.

We respectfully disagree. It is clear MoPac had a duty to make its workplace safe, and lodging facilities, in certain circumstances, can be part of the workplace. In addition, any negligence of MoPac's statutory agent, Rosella Ray, could be imputed to MoPac.

The FELA imposes a nondelegable duty upon the railroad to provide its employees with a safe place to work.[10] *See Shenker v. Baltimore & O.R.R.*, 374 U.S. 1, 7 (1963); *Ackley v. Chicago & N.W. Transp. Co.*, 820 F.2d 263, 267 (8th Cir. 1987). This duty is broader than a general common law duty of care. *See Ackley*, 820 F.2d at 267. The railroad's nondelegable duty extends to the property of third parties and includes an obligation to inspect the premises of the third party and to protect the railroad's employees from dangerous conditions. *See Empey v. Grand Trunk W.R.R.*, 869 F2d 293, 296 (6th Cir. 1989).

MoPac had a long-term lodging contract with Ray. The first contract was executed in 1972, and MoPac and Ray continued to enter new agreements until the contract at issue was signed in November of 1984. Pursuant to these agreements, five out of the eight rooms at Rosella Ray's Boarding House were reserved for MoPac's employees. Lockard testified that he always stayed at Rosella Ray's because it was approved by MoPac. Ray was therefore an agent of MoPac. *See Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 331-32 (1958) (when employee's injury caused by third party performing contractual operational activities of railroad, third party is "agent" of the railroad under FELA). When the railroad provides lodging for its employees, this is an operational activity for which negligence may be imputed to the railroad. *See Empey*, 869 F.2d at 296-97.

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[10]The FELA provides that every common carrier by railroad shall be liable in damages to its employees who are injured "from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51.

A jury's verdict should not be overturned unless there is no basis for finding that the employer's negligence played a part in the employee's injury. *See Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506-07 (1957). This circuit has stated that under the FELA, "the right of the jury to pass upon the question of fault and causality must be most liberally viewed. * * * [T]he jury's power to engage in inferences must be recognized as being significantly broader than in common law negligence actions." *Ybarra v. Burlington N.*, 689 F.2d 147, 149 (8th Cir. 1982) (quoting *Chicago, Rock Island & pac. R.R. v. Melcher*, 333 F.2d 996, 999 (8th Cir. 1964)). Our review of the record indicates that there was sufficient evidence to support a finding that MoPac's negligence contributed to Lockard's injury. There was also sufficient evidence for the jury to determine that Ray was negligent, and that this negligence was imputable to MoPac.

MoPac also asserts that the trial court erred in instructing the jury that Lockard was an employee as a matter of law, and that any negligence of Ray could be imputed to MoPac. We find these claims to be without merit. In *Empey*, the court held that "an employee who is injured while he avails himself of housing which his employer has provided and implicitly encouraged him to use is within the scope of his employment for the purposes of the FELA." 869 F.2d at 295. The trial court's instruction on imputed negligence was approved in Empey, 8699 F.2d at 296-97, and *Payne v. Baltimore & O.R.R.*, 309 F.2d 546 (6th Cir. 1962),. *cert. denied*, 374 U.S. 827 (1963). Thus, we find that the district court did not err in its instruction to the jury.

C. Inconsistent Jury Verdicts

Mopac argues that, in any event, the trial court committed reversible error in entering judgment on a jury verdict that was internally inconsistent. The jury found that MoPac was liable for $600,000 reduced by a finding of twenty percent contributory negligence. The jury also found that Ray was liable for $200,000 reduced by a finding of twenty-five percent contributory negligence. The district court found that "[t]he differing standards of liability for the two defendants provide a sufficient, reasonable basis for finding that the answers to the interrogatories and the different damage awards are not fatally

inconsistent." *Lockard v. Missouri Pac. R.R.*, No. 86-0-283, slip op. at 8 (D. Neb. Nov. 16, 1988).

The verdict form used by the district court sought a general verdict accompanied by answers to special interrogatories. Federal Rule of Civil Procedure 49 (b) states that when the answers to the special interrogatories are inconsistent with each other and with the general verdict, the court should not enter judgment but return the answers to the jury or order a new trial.[11] However, if trial counsel fails to object to any asserted inconsistencies and does not move for resubmission of the inconsistent verdict before the jury is discharged, the party's right to seek a new trial if waived. *See White v. Celotex Corp.*, 878 F.2d 144, 146 (4th Cir.), *cert. denied*, 110 S. Ct. 406 (1989); *Ludwig v. Marion Laboratories, Inc.*, 465 F.2d 114, 118 (8th Cir. 1972). The purpose of the rule is to allow the original jury to eliminate any inconsistencies without the need to present the evidence to a new jury. *White*, 878 F.2d at 146. This prevents a dissatisfied party from misusing procedural rules and obtaining a new trial for an asserted inconsistent verdict. *Id.*

In this case, the jury's verdict was returned on July 1, 1988. The district court entered judgment on the verdict on August 18, 1988. On August 25, 1988, MoPac filed a Motion for J.N.O.V. or for a New Trial. In its brief in support of the motion, MoPac noted that the verdicts were inherently inconsistent and that a new trial would be necessary. The district court took the matter under advisement and subsequently overruled the motion.

There is no indication in the record that MoPac ever moved to have the inconsistencies resubmitted to the jury for reconciliation. MoPac did not object, nor did it file its motion for a new trial until after the jury

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[11]Fed. R. Civ. P. 49 (b) provides in relavant part: (b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict. * * * When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trail.

had been discharged. After reading the instructions and the verdict form to the jury, the district court allowed trial counsel to make any objections or take any exceptions to the court's charge. *See* Trial Transcript at 566-67. MoPac did not object to the verdict form at that time. Thus, we find that MoPac waived its right to a new trial based upon inconsistencies in the verdict returned by the jury.

Moreover, MoPac has not been prejudiced by the district court's entry of judgment on the verdict. The jury apparently intended to apportion total damages of $800,000 between the two defendants. This was the view of the district court, and it comports with the Supreme Court's holding that:

> it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U.S. 335, 364. We therefore must attempt to reconcile the findings, by exegesis if necessary, * * * before we are free to disregard the jury's special verdict and remand the case for a new trial.

Gallick v. Baltimore & O.R.R., 372 U.S. 108, 119 (1963) (citations omitted); *see also Bell v. Mickelsen*, 710 F.2d 611, 618 (10th Cir. 1983) (apportionment of damages between two defendants indicates jury intended to award sum of the two amounts). We agree, however, that apportionment of the damages was improper in this case. The law is clear that where there is but one indivisible injury caused by the joint or concurrent acts of two tortfeasors, each tortfeasor is jointly and severally liable for the entire amount of damages. *See, e.g., Mitchell v. Volkswagenwerk, AG*, 669 f.2D 1199, 1203 (8th Cir. 1982); Restatement (Second) of Torts § 433A (1965). The judgment now standing against MoPac is $480,000 — well below the liability it would be facing had the district court properly entered judgment under a joint and several liability theory. Therefore any prejudice resulting from an inconsistent verdict or the entry of judgment thereon lies

solely with the plaintiff who did not raise the issue below, and has not appealed the judgment.[12]

III. CONCLUSION

We have considered the remainder of the arguments asserted by the parties and find them to be without merit.

Accordingly, we affirm the judgment against MoPac. We vacate the judgments and dismiss the claims against Ray for lack of federal jurisdiction. We do so without prejudice to any rights the parties may have against Ray in state court.

BEAM, Circuit Judge, concurring in part and dissenting in part.

I concur in the result reached by the majority with regard to the inconsistent jury verdicts. I disagree with its speculation that the jury intended to apportion total damages of $800,000 between the two defendants. I believe, however, that the judgments are susceptible to reconciliation under rules of law available to the district court.

I dissent with regard to the majority holding on the issue of pendent party jurisdiction.

The district court entered judgment on both the federal and the state claims before the United States Supreme Court decided *Finley v. United States*, 109 S. Ct. 2003 (1989). As indicated by the majority, in *Finley*, the Court held that the Federal Tort Claims Act (FTCA) prohibited federal district courts from asserting pendent party jurisdiction in

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[12]This analysis also disposes of MoPac's argument regarding the inconsistency in the jury's findings as to the percentage of contributory negligence. Even if we were to assume that the higher percentage — 25% — should apply, MoPac still is not prejudiced by the existing $480,000 judgment since under joint and several liability MoPac would be liable for $800,000 reduced by 25%, or $600,000.

cases brought pursuant to the FTCA.[13] The Court examined the text of the FTCA which provides that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States" for certain torts of federal employees acting within the scope of their employment. 28 U.S.C. § 1346 (b). The Court concluded that the "statute here defines jurisdiction in a manner that does not reach defendants other than the United States." *Id.* at 2009.

In *Finley*, the Supreme Court explained the development of the doctrines of "pendent claim" and "pendent party" jurisdiction. The Court cited *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), in which the concept of pendent claim jurisdiction was upheld. The *Gibbs* Court allowed parties properly before the court to litigate both federal and nonfederal claims that "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them in one judicial proceeding." *Finley*, 109 S. Ct. at 2006 (quoting *Gibbs*, 383 U.S. at 725).

The Supreme Court in *Finley* then distinguished the doctrine of pendent claim jurisdiction from pendent party jurisdiction. With

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[13]In *Finley*, a woman brought a tort action in state court after her husband and two children were killed in a twin-engine airplane accident at the San Diego, California, airfield. The woman sued the San Diego Gas and Electric Company and the city of San Diego for negligence in the positioning of the electric transmission lines that the plane struck during its approach to the airfield, and for negligence in the maintence of the runway lights. The woman subsequently sued the United Stated in the United States District Court for the Southern District of California when she discovered that the Federal Aviation Administration was responsible for the runway lights. This claim based jurisidiction on the FTCA. A year later, the woman moved to amend the federal complaint to include the state claims against the original defendants. The district court granted the motion based on *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and "pendent-party jurisdiction." The district court certified an interlocutory appeal to the Ninth Circuit Court of Appeals. The Ninth Circuit summarily reversed because it had categorically rejected pendent-party jurisdiction under the FTCA in an earlier opinion. The Supreme Court granted certiorari "to resolve a split among the Circuits on Whether the FTCA permits an assertion of pendent jurisdition over additional parties." *Finley*, 109 S. Ct. at 2005

pendent party jurisdiction, courts assert jurisdiction over additional parties that are not involved in the federal claims properly before the court. In *Finley*, the Supreme Court relied on *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), *Aldinger v. Howard*, 427 U.S. 1 (1976), and *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978), for a discussion of pendent party jurisdiction.

In *Zahn*, a plaintiff had a diversity action claim for less than the statutory jurisdictional minimum of $10,000. The plaintiff attempted to append his claim to the jurisdictionally adequate claims of other members of his class. The *Zahn* Court rejected this approach based on "the statutes defining the jurisdiction of the District Court." *Zahn*, 414 U.S. at 292.

In *Aldinger*, the Court held that there was no pendent party jurisdiction over a county in a 42 U.S.C. § 1983 claim. After examining the civil rights jurisdictional statute, 28 U.S.C. § 1343(3), the Court inferred a congressional intent to protect counties from § 1983 lawsuits. The Supreme Court stated that:

> [i]n short, as against a plaintiff's claim of additional power over a "pendent party," the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power has been extended by Congress.
>
> Resolution of a claim of pendent-party jurisdiction, therefore, calls for careful attention to the relevant statutory language.

Aldinger, 427 U.S. at 17.

In *Kroger*, the Supreme Court did not allow the exercise of jurisdiction over the asserted nonfederal claim. Pursuant to the diversity statute, 28 U.S.C § 1332(a) (1), the Court inferred a congressional concern to strictly confine jurisdiction to situations in which there was diversity between all of the defendants and all of the plaintiffs. The Court stated that "there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim." *Kroger*, 437 U.S. at 373.

Zahn, *Aldinger*, and *Kroger* emphasize that before exercising pendent party jurisdiction, a court must examine the federal statute under which primary jurisdiction is asserted. The court must determine whether the words or history of the statute suggest that Congress expressly or impliedly *prohibited* the exercise of jurisdiction over the asserted nonfederal claim.[14] Thus, based on its discussion of the various pendent party cases and its focus on the statutory language, the Supreme Court in *Finley* did not eliminate pendent party jurisdiction. In *Finley*, the Supreme Court stated that:

> it is not that the "statutory power to decide this case" is *defeated* by the joinder of a private party for purposes of a claim over which the District Court has no independent jurisdiction, but that the statutory power to decide a case including such a claim simply does not exist, since the FTCA provides jurisdiction only for claims against the United States.

Finley, 109 S. Ct. at 2009 n.6. The Court explained its decision by stating that "[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Id.* at 2010. The Court's focus, therefore, was, as indicated, on the proper interpretation of the FTCA language. Accordingly, our focus must be on interpretation of the language of the FELA.

The FELA provides, in relevant part, that:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, . . . shall be liable

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[14]The majority opinion states that "pendent party jurisdiction exists only where Congreess has *affirmatively granted* such jurisdiction" and cites *Finley*, 109 S. Ct. at 2009. There is nothing on page 2009 that supports this conclusion. Rather, the Supreme Court explains the petitioner's argument that the rewording of the FTCA has created an affirmative grant of pendent partry jurisdiction. The Supreme Court disagreed with this interpretation of the FTCA but did not decide *Finley* on that basis. Thus, even considering Justice Blackmun's analysis of the majority opinion as experssed on his dissent, *id.* at 2010, I believe that the majority opinion misinterprets *Finley*.

> in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

As can be seen, the range of the FELA is much broader than the reach of the FTCA. The FELA does not provide that the district courts "shall have exclusive jurisdiction" of civil actions based on claims against the railroad. Rather, the FELA discusses liability resulting from the negligence of parties other than the railroad. As a result numerous courts have held that the language of the FELA allows assertion of pendent party jurisdiction. *See Madarash v. Long Island R.R.*, 654 F. Supp. 51, 54 (E.D.N.Y. 1987) (Pendent party jurisdiction proper because nothing in FELA negates such jurisdiction); *Shogren v. Chicago, Milwaukee, St. P. & Pac. R.R.*, 630 F. Supp. 233, 234 (D. Minn. 1986) (nothing in statute conferring FELA jurisdiction suggests that Congress negated exercise of jurisdiction over asserted nonfederal claim); *Potter v. Rain Brook Feed Co.*, 530 F. Supp. 569, 579 (E.D. Cal. 1982) (Congress has not precluded exercise of pendent jurisdiction in actions under FELA); *DeMaio v. Consolidated Rail Corp.*, 489 F. Supp. 315, 316 (S.D.N.Y. 1980) (Congress did not explicitly or implicitly negate pendent party jurisdiction under FELA and thus, injured railroad employee was allowed to sue railroad's hired taxicab owner when taxicab hit another car).

Therefore, I would follow the Supreme Court's direction and adjudicate "against a background of clear interpretive rules, so that [Congress] may know the effect of the language it adopts." *Finley*, 109 S. Ct. at 2010. Since the Supreme Court did not expressly eliminate pendent party jurisdiction, and Congress did not provide the district courts with "exclusive jurisdiction" over FELA actions, I would hold

that pendent party jurisdiction was proper in this case, and the district court properly entertained Lockard's state law claims against Rosella Ray.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 86-0-283

LELAND LOCKARD, et al.,
Plaintiffs,

v.

MISSOURI PACIFIC RAILROAD and
ROSELLA RAY, d/b/a
ROSELLA RAY'S BOARDING HOUSE,
Defendants.

MEMORANDUM OPINION

ROBINSON, Senior Judge

THIS ACTION was tried to the Court and a jury in late June, 1988. The basic facts of the action are as follows: Plaintiff Leland Lockard, a Missouri Pacific Railroad employee, worked on the Missouri Pacific line which ran between Auburn and Crete, Nebraska. The complete run involved a one night layover in Crete and the Missouri Pacific provided and paid for crew accommodations through a contractual arrangement with Rosella Ray's Boarding House which Rosella Ray managed and maintained. On December 14, 1984, Leland Lockard arrived in Crete aboard a Missouri Pacific train and stayed at Rosella Ray's. On the morning of December 15, 1984, as he exited the Boarding House to rejoin his train crew, Leland Lockard slipped and fell down the front entry stairs to the Boarding House. Prior to and at the time of Lockard's fall, a freezing drizzle fell in the Crete area coating the front steps with an icy glaze. Plaintiff Leland Lockard filed an action against defendant Missouri Pacific based on the Federal Employers Liability Act and against defendant Rosella Ray on state tort negligence claims. Plaintiff Lynette Lockard, Leland's wife, filed a state tort based claim against Rosella Ray for loss of consortium. On

July 1, 1988, the jury returned its verdict in favor of the plaintiffs and against the defendants. In Leland Lockard's action against the Missouri Pacific the jury assessed damages at $600,000.00 and attributed contributory negligence to Lockard of 20%; in Leland Lockard's action against Rosella Ray the jury found damages in the amount of $200,000.00 and assessed his contributory negligence at 25%, and in Lynette Lockard's action against Rosella Ray, the jury assessed damages in the amount of $50,000.00. (Filing 52). After reducing the damage amounts to reflect the plaintiff's degree of contributory negligence, the Court entered judgment upon the verdict on August 18, 1988 (Filing 58). The defendants individually filed motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial citing a variety of bases in support of their motions (Filings 60, 63). On October 12, 1988, the Court heard oral arguments on these motions and now overrules them in their entirety for the following reasons.

A motion JNOV should be granted only "when all the evidence points one way and is susceptible of no reasonable inference sustaining the position of the non-moving party." *Brooks v. Woodbine Motor Freight, Inc.*, No. 87-1437, slip op. at 3 (8th Cir. July 28, 1988). In making this assessment the Court must view the evidence in the light most favorable to the prevailing party, resolve all factual conflicts in its favor, assume all facts in its favor which the evidence tends to prove, and give it the benefit of all reasonable inference. As the Eighth Circuit stated in *Brooks, supra*, "the standard for granting a [motion] J.N.O.V. is whether there is sufficient evidence to support the jury verdict." On the alternative motion for a new trial "the proper standard for determining whether a new trial is in order is, whether or not the verdict is against the great weight of the evidence. [cites omitted]. 'When through judicial balancing the trial court determines that the first trial has resulted in a miscarriage of justice, the court may order a new trial, otherwise not'." *Cole v Williams*, 798 F.2d 179, 187 (8th Cir. 1972) *cert denied*, 410 U.S. 930 (1973).

On its motion JNOV defendant Missouri Pacific makes two arguments: a) that plaintiff Leland Lockard failed to produce sufficient evidence, or any evidence, which demonstrated that defendant Missouri Pacific was negligent, thus, Missouri Pacific argues the jury verdict has the effect of elevating the Missouri Pacific to the status of insurer contrary to the law; and b) that the causative factors of this injury could not have been reasonably foreseen by Missouri Pacific. Generally, Missouri Pacific argues that it cannot be held liable for the negligence of a third party and that in this action there was simply no evidence from which any reasonable finder of fact could conclude that the Missouri Pacific itself was negligent. Defendant argues that no defective condition that existed at the Boarding House could or should have been corrected by it and that the icy condition of the Boarding House steps under the conditions then prevalent could not have been prevented. Further the defendant argues that the causative factors of the accident were not foreseeable, thus eliminating an essential element of FELA negligence. The Court, however, does not agree with these arguments. Under FELA precedent, it has been established that the negligence of a third party can be attributed to a railroad employer when that negligence causes an injury to a railroad employee. *See Carter v. Union Pacific Railroad Company*, 438 F.2d 210-211 (3rd Cir. 1971); *Carner v. Pittsburg & Lake Erie Railroad*, 316 F.2d 277, 282 (3rd Cir. *cert denied*, 375 U.S. 814 (1963). Railroad liability was based on the agency relation established between the railroad and the third party; Carney, supra, is particularly instructive on the basis of liability and closely resembles the facts in the instant action.

In *Carney*, the defendant railroad employed the plaintiff employee on a work-project some distance from the employee's home. The defendant railroad arranged for the plaintiff and other similarly situated employees to stay at a local (the "railroad") Y.M.C.A. for which the railroad was billed directly. Had the plaintiff stayed anywhere else the defendant would not have paid for his accommodations, thus causing the court to conclude that the plaintiff was encouraged to utilize the Y.M.C.A. facilities. The plaintiff's daily working hours were from 8:00 a.m. to 4:30 p.m.; he was not subject to call at other

times. Based on these facts the Third Circuit concluded a) that the plaintiff was "employed" for the purposes of the FELA at the time he fell from the negligently maintained Y.M.C.A. bed, and b) that by providing lodging services to the railroad's employees the Y.M.C.A. "was performing operational activities of the plaintiff employer and in that capacity was an agent for the employer in accordance with Section 1 of the Employers' Liability Act." *Id.* at 279. The court further noted that even though the plaintiff was in his room at the Y.M.C.A. when he fell, he was there under specific agreement with his employer and he was in the course of his employment when he was hurt. The *Carney* court in supporting its finding of the railroad's liability under the "performing operational activities" theory, which was gleaned from *Sinkler v. Missouri Pacific Railroad*, 356 U.S. 326, 332 (1958) ("when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of Section 1 of FELA"), focussed on the benefits the railroad derived from the plaintiff's lodging at the Y.M.C.A. and concluded that his accessibility was as much a part of that enterprise [i.e., the project he worked on] as was his actual job of laying cable.

In the instant action many of the factors found in *Carney supra*, also appear, such as the contractual agreement between Missouri Pacific and Rosella Ray to provide lodging services to railroad employees in which the railroad paid the bills and Rosella Ray maintained the premises; the necessity of those services in light of the distance the railroad run took the plaintiff from his home; and the encouragement, however subtle, that the railroad employees received to stay at the boarding house. Factually, it appears that the cases are virtually indistinguishable. Defendant Missouri Pacific makes much of the fact that it could not have done anything to prevent this accident and that the Boarding House was under the control of a third party to maintain. Under the *Carney* case the railroad liability is not based on its control of the premises where the injury occurred but results from the relationship between the railroad and the owner of the premises. In fact, the *Carney* court declined to base its opinion on the control theory. *Id.*

at 279. This basis of liability amply supports the jury verdict here, thus defendant's motion JNOV on this issue is overruled.

Next, defendant Missouri pacific argues that the accident which occurred was not a foreseeable one, thus negating one of the essential elements of an FELA action - foreseeability. Defendant rests its position primarily upon the freezing drizzly conditions causing the accident. The Court does not accept this argument for several reasons. First, it is not unforeseeable that a freezing drizzle creating slippery, icy conditions could take place in Nebraska in December; thedefendant, having operated a railroad in the area must have known of this possibility. Next, although the defendant focussed exclusively upon the weather conditions, the plaintiff at trial presented evidence regarding the alleged defectiveness of the front stairs handrail which was placed so that it could not be grasped without first stepping out onto the steps. It was the combination of the icy conditions and the awkwardly placed handrail which, the plaintiff argued, led to his slip and fall. That this accident could occur is not unforeseeable so as to sustain the defendant's motion JNOV, therefore, it is overruled.

In the alternative, defendant Missouri Pacific contends that it should be granted a new trial for the following reasons upon which it set for the arguments in its brief: a) the answers to the special interrogatories are irreconcilably inconsistent; b) the Court erred in instructing the jury that any negligence of co-defendant Rosella Ray must be inputed to Missouri Pacific; c) the Court erred in failing to instruct on the proper standard of liability for weather related conditions; and d) the Court erred in failing to instruct the jury that the plaintiff's work status while off duty was a question of fact for the jury to resolve.

Defendant Missouri Pacific argues that the jury's answers to interrogatories, in which it assessed the plaintiff's contributory negligence in his case against Missouri Pacific at 20% while assessing it at 25% against defendant Rosella Ray, and the differing damage amounts assessed against each defendant create an inconsistency which requires a new trial pursuant to Rule 49(b), Fed.R.Civ.P. Since each defendant's alleged negligence was based upon the same evidence the defendant

argues that these answers are inherently inconsistent, for no legally sufficient rationale can justify the jury's determination of differing degrees of the plaintiff's contributory negligence and the significantly disparate damage awards.

In response the plaintiffs contend that when evaluating allegedly inconsistent answers to interrogatories the Court must indulge every reasonable intendment to support a verdict and that before a verdict will be set aside the Court must conclude that an irreconcilable conflict exists. *See Flush v. Erie Railroad Company*, 110 F.Supp. 118, 120 (D.N.J. 1953). The plaintiffs argue that the Court must make every effort to reconcile the jury verdict and if a view exists, in light of all of the circumstances of the case, especially the issues and instructions submitted to the jury, which makes the jury's answers consistent then the Court is compelled by the Seventh Amendment to adopt that view and enter judgment accordingly. *Griffin v. Matherine*, 471 F2d 911, 915 (5th Cir. 1973). Plaintiffs contend that the differing standards of liability for each defendant answers this issue in that defendant Missouri Pacific had a higher standard of care than did defendant Rosella Ray which allowed the jury to assess differing degrees of contributory negligence against plaintiff Leland Lockard. Additionally, the plaintiffs argue that the verdict form required the jury to return separate responses and verdicts against each defendant so that as to each defendant no inconsistency exists. Finally, the plaintiff argues that the differing damage amounts assessed against each defendant is also consistent with the requirements of the verdict form and the differing standards of liability applicable to each defendant.

In *Gallick v. Baltimore & Ohio Railroad Company*, 372 U.S. 108, 119 (1963) the Supreme Court held that when confronted with an allegedly fatal inconsistency in answers to interrogatories

> "it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U.S. 335, 364. We therefore must attempt to reconcile the

> findings, by exegesis if necessary, [citations omitted] before we are free to disregard the jury's special verdict and remand the case for a new trial."

When confronted with a situation in which answers to interrogatories are allegedly inconsistent the court "is obliged to reconcile the answers, if possible, in order to validate the jury's verdict. [cites omitted]. Indeed, this effort is required by the Seventh Amendment [citations omitted]. The touch-stone in reconciling apparent conflict is whether 'the answer may fairly be said to represent a logical and probable decision on the relevant issues as submitted.'" *White v. Grinfas*, 809 F2d 1157, 1161 (5th Cir.1987) *quoting Griffin v. Matherine*, 471 F2d 911, 915 (5th Cir. 1973). "The consistency of the jury verdicts must be considered in light of the judge's instructions to the jury." *Bates v. Jean*, 745 F.2d 1146, 1151 (7th Cir. 1984). With these standards in mind the Court concludes that this basis of the defendant's motion for a new trial should be overruled. The differing standards of liability for the two defendants provide a sufficient, reasonable basis for finding that the answers to the interrogatories and the different damage awards are not fatally inconsistent. Other courts have similarly held in cases involving the Jones Act, a statutory scheme involving a standard of liability like that employed in the FELA. For example in *Ayala v. Moore-McCormack Lines, Inc.*, 55 F.R.D. 263, 265 (S.D.N.Y. 1972), the court concluded that answers to interrogatories finding the defendant liable on one claim but not on another could "be reconciled upon the differing standards of proximate cause in the unseaworthiness claim and contributory cause in the Jones Act claim;" thus, the court concluded, "the reconciliation must be made." *See also Alverez v. J. Ray McDermott & Co., Inc.*, 674 F2d 1037, 1041 (5th Cir.1982) (differing standards of liability supported consistency of jury's answers to interrogatories); *Cote v. Estate of Butler*, 518 F2d 157, 161 (2nd Cir. 1975) (where in car accident litigation the court held that different standards of duty owed to third parties reconciled allegedly fatal inconsistencies in jury's answers to interrogatories).

Next, defendant Missouri Pacific argues that the Court erred in refusing to give defendant's Proposed Instruction 37 on climatic conditions. The Court, however, disagrees. In *Chicago & North Western Railway Company v. Rieger*, 326 F.2d 329, 333 (8th Cir.1964), the Eighth Circuit stated that "[t]he McGivern case does not hold, as stated in the Raudebush case, that a railroad is not liable to its employee for injuries resulting from climatic conditions." The defendant's proposed instruction blanketly absolves the railroad from injuries caused by climatic conditions; since that does not appear to be the law, this ground for the defendant's motion is overruled.

Defendant next argues that the Court's instructions numbers 31 and 32 erroneously changed the fundamental nature of FELA law by placing the plaintiff within the protections of the FELA while he commuted to and from work and by implementing a no-fault liability standard. First, it appears that the defendant's argument simply rehashes the argument made in its motion JNOV, therefore it should be overruled. Next, while the defendant argues that the employment status of the plaintiff was a question of fact for submission to the jury, it appears that the Court's instruction merely set out the pertinent guidelines for determining when a railroad worker would be within the scope of his or her employment. Therefore, based on the above reasons defendant Missouri Pacific's motion for a new trial is overruled.

Defendant Rosella Ray has also filed a posttrial motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. In support of her motion JNOV defendant Rosella Ray contends that a) the Court should have granted her motion for a directed verdict because she had no duty to take remedial or protective action except within a reasonable time after cessation of the precipitation, and b) that the evidence established that, as a matter of law, the plaintiff was guilty of negligence more than slight as to completely bar his recovery pursuant to Neb.Rev.Stat. Section 25-21, 185 (R.R.S. 1943).

Initially, defendant Rosella Ray contends that her duty to remove snow and ice form the steps of her boarding house began a reasonable

time after the freezing drizzle stopped. Plaintiff, in response, argues that the law is not so rigidly applied and that the defendant's duty arises from the conditions then existing. In *Danner v. Myott Park, Ltd.*, 209 Neb. 103, 107, 306 N.W.2d 580 (1981) the Nebraska Supreme Court disapproved an instruction which indicated that a landlord could wait until a reasonable time after a storm had run its course before removing snow and ice from entryways. Instead, the court approved an instruction that the "landlord was afforded a reasonable time within which to make the condition safe . . . . " *Id.* at 106. The court rejected a rigid time frame for determining when the duty arose in favor of allowing the jury to determine whether the actions were reasonable. Therefore, defendant's argument is overruled.

Next, defendant Rosella Ray contends that the plaintiff was contributorily negligent in a degree more than slight thus barring his recovery under Neb.Rev.Stat. Section 25-21, 185 (R.R.S. 1943). Defendant relies on the evidence established at trial, which defendant argues demonstrated that the plaintiff was in a position to protect himself but failed to do so, and the jury's conclusion that the plaintiff was 25% contributorily negligent. Plaintiff argues first that the circumstances of the case gave rise to a jury question, that the defendant's duty encompassed not only the weather conditions but also the condition of the egress area, and, finally, that Nebraska law rejects any rigid percentage formula for determining whether a plaintiff's contributory negligence is more than slight in degree. *Burney v. Ehlers*, 185 Neb. 51, 54, 173 N.W.2d 398 (1970).

Having examined the arguments and authorities presented the Court concludes that this aspect of defendant's motion JNOV should also be overruled. In Nebraska, determination of negligence or contributory negligence and the comparative measuring of the two are basically factual issues determined by the jury. *Koerner v. Perella*, 213 Neb. 198, 191, 328 N.W.2d 473, 475 (1982). The jury's conclusion shall not be disturbed. Additionally, the Nebraska Supreme Court has stated that "[a] comparison of the negligence of the two parties involved in a accident cannot easily be translated into a

mathematical ratio. This court has never adopted a rule that contributory negligence of more than a certain percent will bar recovery as a matter of law. The statute [Neb.Rev.Stat. Section 25-21, 185, formerly Section 25-1151] does not contemplate such a rule and we do not believe that the adoption of such a rule would further the administration of justice." *Burney v. Ehler, supra.* Therefore, defendant Rosella Ray's motion JNOV is overruled in its entirely.

In support of her alternative motion for a new trial defendant Rosella Ray advances two arguments: a) that the verdict is improper because of the inconsistent answers to interrogatories regarding damages cannot support a valid judgment; and b) that the Court erred in failing to give defendant's Proposed Instructions and in actually giving instructions 40, 44, and 49. In her initial argument the defendant contends that the verdict form's provision of separate damage interrogatories is contrary to Nebraska law which prohibits apportioning damages among joint tortfeasors for a single, indivisible injury. *See Froslund v. Swenson,* 110 Neb. 188, 192 N.W. 649 (1923). Furthermore, she contends that the verdict form creates an ambiguity because the differing damage amounts assessed against each defendant leaves the parties to speculate about the total damage amount the plaintiff sustained. The plaintiff responds to these arguments by first noting that the defendant Rosella Ray herself provided the verdict from which the Court used almost verbatim. Therefore, she cannot now complain about an error she helped bring about. In addition, the plaintiff argues that the differing standards of liability provide a consist interpretation of the allegedly inconsistent verdict form.

Initially, the Court notes that the verdict from utilized in instructing the jury was provided by defendant Rosella Ray and the Court made neither a significant nor substantive change in it. Nor did the defendant object to the use of this verdict from when the opportunity arose prior to the jury's deliberations. Although it appears that the defendant accurately cites Nebraska precedent for its position that damages should not have been awarded separately, in the case cited, *Froslund v. Swenson, supra,* both defendants had the same standard of liability. Under the instant action, however, the different standards of liability

justified the jury's assessment of different damage amounts against each defendant. *See also Hooks v. Vet*, 192 F. 314, 315 (5th Cir. 1911) (where the court sustained separate damage amounts awarded against defendants who had pled separately). For these reasons this basis of defendant Rosella Ray's motion for a new trial is overruled.

Next, the defendant Rosella Ray contends that the Court erred in refusing to give her Instructions numbers 1 and 7 but in actually giving its own Instructions 40, 44, and 49. Basically the defendant argues that the Court in numbers 44 and 49, mistakenly instructed on the business-invitee standard rather than the landlord-tenant standard and that by doing so heightened the defendant's standard of duty while lowering the plaintiff's burden of proof. In number 40, she argues that the Court erred by using the verbatim recitation of the plaintiffs' allegations of negligence thus allowing the jury to speculate on how the defendant should have safely and properly maintained egress from the boarding house.

The Court agrees with the plaintiffs' refutation of these arguments. First, in *Cook v. Lowe*, 180 Neb. 39, 141 N.W. 2d 430, 431 (1966) the Nebraska Supreme Court applied the business-invitee standard to a factual situation in which a woman was visiting her husband at a motel, at which he resided during a work project, injured herself while on the premises. Under the facts of the present case it is difficult to accept the defendant's argument that the plaintiff-Leland Lockard was not upon the premises for a business purpose. The defendant held her boarding house open to the public. Under a contractual agreement, she provided rooms to Missouri Pacific workers, billing Missouri Pacific directly for the number of rooms actually provided during the month. This situation hews much closer to the business-invitee relationship than it does to the landlord-tenant relationship.

Finally, recently in *Carnes v. Weesmen*, 229 Neb. 641, __ N.W.2d __ (1988) the Nebraska Supreme Court addressed the issue of an allegedly general jury instruction and in so doing upheld the same. In upholding general jury instruction and in so doing upheld the same. In upholding the allegedly flawed instruction the *Carnes* court noted

that evidence at trial provided specific underpinnings for the general instruction. So too in the instant action. The instructions complained of, although general, were anchored by specific evidence at trial, (e.g. failure to salt or sand, failure to remove ice/snow, or poorly placed handrail) and were not so general as to allow the jury to unsoundly speculate on the basis of the defendant's negligence. *Cf Graham v. Simplex Motor Rebuilders, Inc.*, 189 Neb. 507, 511, 203 N.W. 2d 494, 497 (1973) (where the court found too speculative in instruction stating that negligence may be found "'in otherwise failing to observe that standard of care and caution required of reasonably prudent persons under the circumstances'"). In addition, the Court is not persuaded that the recitation of Instruction 40 is error since it contains allegations of negligence supported at trial. For these reasons defendant Rosella Ray's motion JNOV, in the alternative for a new trial, is overruled in its entirety.

An Order reflection the conclusions of this Memorandum shall be filed forthwith.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 86-0-283

LELAND LOCKARD and LYNETTE LOCKARD,
Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, and
ROSELLA RAY d/b/a
ROSELLA RAY'S BOARDING HOUSE,
Defendants.

ORDER

Pursuant to the accompanying Memorandum Opinion, defendant Missouri Pacific's and defendant Rosella Ray's motions for judgment notwithstanding the verdict, or in the alternative, for a new trial are overruled.

IT IS SO ORDERED.

DATED this 16th day of November, 1988.

BY THE COURT:

/s/ Richard E. Robinson

SENIOR JUDGE,
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 86-0-283

LELAND LOCKARD and LYNETTE LOCKARD,
Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, and
ROSELLA RAY d/b/a
ROSELLA RAY'S BOARDING HOUSE,
Defendants.

ENTRY OF JUDGMENT

THIS ACTION was tried to the court, the Honorable Richard E. Robinson presiding, and a jury commencing June 28, 1988. On July 1, 1988, the jury returned a verdict in favor of plaintiff, Leland Lockard, and against defendants Missouri Pacific and Rosella Ray d/b/a Rosella Ray's Boarding House. The jury also returned a verdict in favor of plaintiff Lynette Lockard and against defendant Rosella Ray.

Reducing the damage amounts found by the jury to reflect the degree of contributory negligence attributed to plaintiff Leland Lockard, the Court now enters judgment in the following amounts:

a) for plaintiff Leland Lockard and against defendant Missouri Pacific Railroad in the amount of $480,000.00;

b) for plaintiff Leland Lockard and against defendant Rosella Ray d/b/a Rosella Ray's Boarding House in the amount of $150,000; and

c) for plaintiff Lynette Lockard and against defendant Rosella Ray d/b/a/ Rosella Ray's Boarding House in the amount of $37,500.00.

All presently pending motions are severally overruled at this time.

DATED this 18 day of August, 1988.

BY THE COURT:

/s/ Richard E. Robinson

SENIOR JUDGE,
UNITED STATES DISTRICT COURT

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1068/1069NE

Leland L. Lockard, et al.,
Appellees,

vs.

Missouri Pacific Railroad Company, et al.,
Appellants.

Order Denying Petition For Rehearing and
Suggestion For Rehearing En Banc.

The suggestion for rehearing en banc filed by the appellees has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge Fagg, Judge Bowman and Judge Beam would have granted the petition. Petition for rehearing by the panel is also denied.

Petition for rehearing by the panel filed by appellant Missouri Pacific Railroad in case No. 89-1068NE is denied.

April 4, 1990

Order entered at the direction of the Court:

Robert D. St. Vrain

Clerk U.S. Court of Appeals, Eighth Circuit.